No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

JAMES BRYSON MARTIN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

JAMES BRYSON MARTIN, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of Texas, rendered in the above entitled cause on January 6, 1965. Petitioner's First Motion for Rehearing was overruled on February 17, 1965.

CITATIONS TO OPINIONS BELOW

The opinions of the Court of Criminal Appeals of Texas in the above entitled cause are as yet unreported, but copies of the said opinions are attached hereto as Appendix B.

JURISDICTION

The Jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1257(3). The opinions of the Court of Criminal Appeals of Texas in this cause are in conflict with the Constitution and Laws of the United States and the holdings of this Honorable Court interpreting said Constitution and Laws.

The judgment in this cause became final on February 17, 1965 upon the entry of the judgment overruling the Motion for Rehearing. With the overruling of said Motion, Petitioner exhausted his State remedies. (Appendix C).

Vernon's Annotated Texas Constitution, Art. 5, § 1 and § 5, provide as follows:

Article 5, § 1

> "Section 1. The judicial power of this State shall be vested in one Supreme Court, in Courts of Civil Appeals, in a Court of Criminal Appeals, in District Courts, in County Courts, in Commissioners Court, in Courts of Justices of the Peace, and in such other courts as may be provided by law."

Article 5, § 5

> "Section 5. The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases of whatever grade, with such exceptions and under such regulations as may be prescribed by law."

The Legislature of the State of Texas, acting pursuant to the aforesaid state constitutional mandate provided for appeals in criminal cases by the enactment of the Code of Criminal Procedure of Texas, Art. 53 to-wit:

> "The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases. This article shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court or county court at law, in which the fine imposed by the county court or county court at law shall not exceed one hundred dollars."

The Court of Criminal Appeals of Texas is the highest appellate Court in Texas in criminal cases. *Pointer* v. *Texas*, ... U.S. ....., 13 L ed 2d 923, 925.

The Motion for Stay of Mandate, pending timely presentation of this Petition for Writ of Certiorari to this Honorable Court, and the Order staying the mandate and all other proceedings to permit the Petitioner to seek a Writ of Certiorari from this Honorable Court, was granted by the Court of Criminal Appeals of Texas on February 18, 1965. Appendix C.

QUESTIONS PRESENTED

FIRST QUESTION

Have the Petitioner's rights under the substantive provisions of the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States been violated where a state conviction was had upon evidence obtained pursuant to a state statute providing for a "Court of Inquiry" which authorizes the issuance of civil process enabling the State to gather evidence to be used in a subsequent criminal proceeding prior to the institution of formal criminal charges, said "Court of Inquiry" having been conducted in the following manner:

a) The Defendant was compelled by civil process to be in attendance as a witness and was deprived of the right against self-incrimination.

b) As a witness, Defendant was deprived of the right of counsel, right of confrontation and right of cross-examination.

c) By virtue of a *subpoena duces tecum* issued and executed while Defendant was in custody, Defendant was compelled to produce books, records and other evidence which was discovered by said process, retained by State authorities and utilized to convict Defendant?

SECOND QUESTION

Have the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States been violated by a state statute which provides for a "Court of Inquiry" as described in Question One which is utilized as an extra-judicial means of investigation of crime and marshalling of evidence and where the knowledge gained as a result thereof is used to convict Defendant?

THIRD QUESTION

Does the Constitution of the United States permit a State to secure a conviction in a case in which after it has come to the attention of the State that the Grand Jury does not have sufficient information upon which to return an indictment, the State recesses the Grand Jury and proceeds with a "Court of Inquiry" as described in the First and Second Questions which is conducted as a public inquisition at which one or more members of the Grand Jury are in attendance and evidence obtained as a result of said "Court of Inquiry" is used to secure an indictment, is subsequently used in the trial on the merits and upon which a conviction is secured against the Defendant?

FOURTH QUESTION

Is a *subpoena duces tecum* which was utilized as a search and arrest warrant which was issued without probable cause, did not contain an affidavit, and evidence gained as a result thereof was used to obtain a conviction in a state criminal proceeding, unconstitutional and void as not complying with the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and Rules Three and Four of the Federal Rules of Criminal Procedure?

FIFTH QUESTION

Has there been a violation of Petitioner's Constitutional rights pursuant to the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States where a state district court judge, in whose district jurisdiction and venue was originally laid, summarily and without a plenary, evidentiary hearing and over Defendant's objection transferred the venue to a foreign district where the instant conviction was secured?

Do the Sixth and Fourteenth Amendments to the Constitution of the United States provide that a state criminal trial must take place in the district where the offense occurred?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved herein are Art. 3, § 2, Cl. 3 and the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States and Art. 1, § 10 and Art. 3, § 45 of the Constitution of Texas. The statutory provisions involved herein are Arts. 560, 886 and 887, Vernon's Annotated Code of Criminal Procedure of Texas and Rules 3 and 4, Federal Rules of Criminal Procedure. Because of their length, the text of all of the foregoing provisions are set forth in Appendix A.

STATEMENT OF THE NATURE OF THE CASE

I. Procedural History of the Case

The Petitioner, an attorney, was jointly charged with four others by indictment with the offense of bribery. The indictment was returned by a Grand Jury of Harris County, Texas and the case was set for trial in the Criminal District Court Number Five of Harris County, Texas.

The Petitioner filed a Motion to Quash the Indictment in the Criminal District Court Number Five of Harris County, Texas. A hearing was had on the Motion and it was denied. After the denial of the aforesaid Motion, which was in the nature of a Motion to Suppress Evidence, the trial court, on its own motion, and over Defendant's objection, without any evidentiary hearing, changed the venue from Harris County, Texas to Brazos County, Texas under color of Art. 560, Vernon's Annotated Code of Criminal Procedure of Texas where the Petitioner was, after another objection to venue, subsequently tried and convicted and sentenced to four years in the state penitentiary and a fine of Twenty-Five Hundred Dollars. A certified copy of said hearing is on file with the Clerk as required by Rule 23 (1) (f).

Petitioner appealed the conviction to the Court of Criminal Appeals of Texas in Cause Number 37,037. The Court of Criminal Appeals affirmed the conviction on January 6, 1965; this affirmance was followed by Petitioner's Motion for Rehearing which was overruled on February 17, 1965. On February 18, 1965 the Court of Criminal Appeals of Texas stayed the execution of the mandate from said court to allow Petitioner an opportunity to prosecute his Petition for Writ of Certiorari to this Honorable Court. See Appendix C.

II. Facts Material to the Questions Presented

Prior to being indicted, but after state authorities had focused their suspicions of guilt upon him (Statement of Facts pp. 34-36 on Motion to Quash the Indictment), Petitioner, under general subpoena as a witness, was required, under threat of imprisonment for contempt and by virtue of a *subpoena duces tecum* issued as a part of the infamous "Court of Inquiry" held by Justice of the Peace W. C. Ragan

and District Attorney Frank Briscoe, investigating the so-called "probate scandal" of Harris County, Texas, to produce for the inspection of and retention by the said District Attorney Briscoe, a great volume of Petitioner's books and records. (S.F. pp. 30-33, 43; 69-71 and 146 on Motion to Quash Indictment)

These personal and business records were obtained through the execution of said *subpoena duces tecum* by state authorities including an investigator in the District Attorney's office, a Deputy Sheriff and an Assistant District Attorney, who accompanied the Petitioner, while under arrest, (S.F. p. 146 on Motion to Quash the Indictment) to his office, home, and bank in their search for and collection of evidence. In the aforesaid "Court of Inquiry", "a witness had the alternative of testifying or being held in contempt of court and imprisoned until he answered the questions under oath as Arts. 886 and 887 of the Code of Criminal Procedure of Texas require." (S.F. p. 43 on Motion to Quash the Indictment). All witnesses in said Court of Inquiry, which included Petitioner, were denied the right to be represented by counsel; were denied the right to offer any evidence in mitigation, extenuation or defense; were denied the right to cross-examine witnesses and all other Constitutional safeguards. (S.F. pp. 34-37 and 85-88 on Motion to Quash the Indictment). Any attorney who attempted to intervene in behalf of any client-witness-suspect was summarily ridiculed, threatened and coerced and the District Attorney of Harris County, Texas often stated in open court that the Court of Inquiry allowed no participants other than those who were called by the District Attorney and no one could interrogate witnesses except the State of Texas and there was to be no cross-examination or confrontation of witnesses. (S.F. 85-88 Motion to Quash the Indictment).

The district court in Harris County, Texas and the trial court (trial on the merits) in Brazos County, Texas both overruled all attempts by Petitioner to quash the indictment which was based to a great extent on the evidence obtained as aforesaid and refused to supress said evidence and declare it inadmissible. (S.F. p. 217 on Motion to Quash the Indictment and p. 150 on trial).

As stated above, the district court in Harris County, Texas, after hearing Petitioner's pre-trial motion and overruling same, (Motion to Quash the Indictment), took it upon himself to change the venue of the case to another county under authority of Art. 560, Vernon's Annotated Code of Criminal Procedure of Texas (S.F. pp. 218-222 on Motion to Quash the Indictment). No evidence was ever adduced to support the aforesaid change of venue and the record clearly reflects that in fact, the court changed the venue because the publicity given the Court of Inquiry proceedings was unfavorable to the Petitioner, with no mention of impartiality concerning the State of Texas, which is clearly required by Art. 560, where no motion for change is requested by the state or the defendant.

Brazos County, Texas is located relatively close to Harris County, Texas and receives television, radio and newspaper coverage from and substantially identical to that in Harris County, and was permeated by the news media with publicity concerning the "Court of Inquiry" proceedings to the same extent as Harris County. Therefore the same prejudices as a result of publicity that existed in Harris County, existed likewise in Brazos County and the change of venue to Brazos County was improper.

The Court of Criminal Appeals of Texas, as reflected by its opinions, incorporated herein as Appendix B, failed to recognize every error alleged and shown by the Petitioner.

III. Federal Questions Raised in the Trial Court and the Court of Criminal Appeals of Texas

A. In the Trial Court

Prior to the trial on the merits below, Petitioner filed his Motion to Quash the Indictment which was also in the nature of a Motion to Suppress Evidence.

The district court in Harris County, Texas overruled the motion over Petitioner's objection and further on its own motion, the Harris County court transferred the venue of the case from Harris County, Texas to Brazos County, Texas, over Petitioner's objection. The trial court in Brazos County reaffirmed all actions of the Harris County court, over proper objection.

B. In the Court of Criminal Appeals of Texas

The Court of Criminal Appeals of Texas on January 6, 1965 in an opinion delivered by Judge Dice, which opinion was approved by the Court held:

> "Complaint is made to the court's refusal to quash the indictment. Appellant timely filed and presented to the court a motion to quash the indictment, in which he alleged numerous reasons why the indictment failed to charge an offense. In the motion, appellant further excepted to the indictment on the ground that it was returned by a grand jury which had before it evidence that had been illegally obtained in a court of inquiry held before Justice of the Peace W. C. Ragan, of Precinct No. One of Harris County, in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States."
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> "Appellant's attack upon the indictment on the ground that it was returned upon evidence illegally obtained in a court of inquiry is similar to that urged

and overruled in *McClelland* v. *State,* 373 S.W. 2d 674, where it was held that such was not a ground for quashing an indictment in this state."

On the issue of the change of venue on the Harris County court's own motion the Court of Criminal Appeals held:

> "Complaint is also made to the court's action in ordering venue changed to Brazos County. Appellant does not present by either formal or informal bill of exception any facts which refute the court's finding that a fair and impartial trial to both appellant and the state could not be had in Harris County. In the absence of such proof it will be presumed, on appeal, that the court had a basis for such finding, and no error is shown. *Ross* v. *State,* 220 S.W. 2d 137."

The Court of Criminal Appeals of Texas specifically ruled on Petitioner's contention that the trial court erred in allowing, over proper objection, the introduction of the evidence obtained as the result of the subpoena issued as a part of the Court of Inquiry, holding:

> "We overrule appellant's contention that the court erred in allowing the state to introduce evidence which was unconstitutionally obtained, in violation of his rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States. An examination of the record does not reflect that any illegally obtained evidence was introduced against appellant. The evidence presented against him consisted of the testimony of witnesses and numerous exhibits of bank records which were presented in court under subpoenas issued by the district clerk of Brazos County. No evidence which appellant insists was illegally obtained in the court of inquiry was introduced upon the trial."

In its Opinion on Appellant's Motion for Rehearing, the Court of Criminal Appeals of Texas dealt at some length

with Petitioner's contention that the evidence introduced over his objection at the trial was inadmissible as "fruits of the poisonous tree". The Court, through the Honorable Judge W. A. Morrison, stated:

> "In a scholarly manner appellant has attacked our original opinion because we failed to discuss his contention that all evidence as to the Tierra Grande books were introduced over his objection that they were tainted under the 'fruits of the poisonous tree' doctrine so ably announced years ago by the Supreme Court of the United States in *Silverthorne Lumber Company* v. *United States,* 251 U.S. 385, 64 L. ed. 319, 40 S. Ct. 182. His contention is bottomed upon the assertion that the subpoena duces tecum issued by the Court of Inquiry which made it possible for the prosecution to secure possession of copies of such records was an illegal process because the Court of Inquiry itself was conducted in an unconstitutional manner."
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> "The answer to this contention seems to be that both our Civil Courts and this Court have had this question before them and have failed to agree with him."
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> "While it is true that this writer on Motion for Rehearing in *McClelland* v. *State,* 373 S.W. 2d 674, expressed his trepidation over the propriety of the manner in which the Court of Inquiry was conducted, and Chief Justice Bell and Justice Coleman expressed their concern over the same matter in *McClelland* v. *Briscoe,* 359 S.W. 2d 635, no court has held that such procedure reaches constitutional dimensions."
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> "*Silverthorne, supra,* was a case of search without a warrant and by virtue of an invalid subpoena. Here we have a subpoena duces tecum (itself a process authorized by statute) issued by the Justice of the Peace who was acting pursuant to his authority after having convened the Court of Inquiry which was authorized by Article 886, V.A.C.C.P., a statute of this State which was first enacted by the Legislature in 1876."

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. This Honorable Court should grant certiorari herein so that it may discuss the substantive provisions of the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and it may effectively explain to the State of Texas its precise holdings in *Boyd* v. *United States,* 116 U.S. 616; *Malloy* v. *Hogan,* 378 U.S. 1, and all of this Court's recent decisions dealing with the interrelationship of the Fourth, Fifth, Sixth and Fourteenth Amendments since the Court of Criminal Appeals of Texas has been unable to apply the Federal standard to the great detriment of Petitioner and to the detriment of all those who have been and are continuing to be subjected to the Court of Inquiry procedure.

This Honorable Court has, in early and in recent terms expressed its views regarding the rights of the individual suspected of crime to be free from unreasonable searches and seizures; to be free from being a witness against himself; to have the effective assistance of counsel; and to have the right of confrontation and cross-examination, all guaranteed by the Constitution of the United States. *Boyd* v. *United States, supra; Silverthorne Lumber Company* v. *United States, supra; Malloy* v. *Hogan, supra; Pointer* v. *Texas, supra; Wilson* v. *United States,* 148 U.S. 60; *Murphy* v. *Waterfront Commission,* 378 U.S. 52; *Counselman* v. *Hitchcock,* 142 U.S. 547; *Hoffman* v. *United States,* 341 U.S. 479; *Aguilar* v. *Texas,* 378 U.S. 108; *Gideon* v. *Wainwright,* 372 U.S. 335; *Massiah* v. *United States,* 377 U.S. 152; and *Escobedo* v. *Illinois,* 378 U.S. 418.

The "Court of Inquiry", is a creature of statute to-wit: Arts. 886 and 887, V.A.C.C.P. The procedure in the instant case was nearly identical in substance with that condemned

by this Honorable Court in the time honored cases of *Boyd* v. *United States, supra* and *Silverthorne Lumber Company* v. *United States, supra,* as well as the recent cases of *Malloy* v. *Hogan, supra,* and *Pointer* v. *Texas, supra.*

The Court of Criminal Appeals of Texas has, with the affirmance of this cause, authorized the executive branch of the State of Texas to conduct investigations under power of process and sanctions of contempt and in which all suspect witnesses subpoenaed have no right to counsel, no right of confrontation, no right of cross-examination of other suspect-witnesses and are not free from unreasonable searches and seizures as a result of subpoenas issued out of the said investigation, even when, as in Petitioner's case, the witness is, in fact, highly suspected of crime, though he may not have been formally charged by complaint. The executive officer of the State of Texas who conducted the Court of Inquiry in question, to-wit: the Honorable Frank Briscoe, District Attorney of Harris County, Texas, stated in his Article, *Texas 'Courts of Inquiry' — A Legitimate Means of Criminal Investigation* published in the *Houston Law Review,* Vol. I, No. 2.

> "Despite protests that this article strips a witness of his rights against self-incrimination, such is not the fact, and certainly not the law. *There is a clear distinction between the privilege of an accused, and one who is merely a witness.* Again, under Texas Law, an accused, or defendant, is one who, in a legal manner, is held to answer for an offense, or against whom complaint in a lawful manner is made, charging an offense, from the order for arrest to the final execution of the law. Clearly, the privilege of an accused is limited to one against whom a punitive criminal proceeding has been specifically directed, as by an indictment or information. Since a court of inquiry is an investigation and not in and of itself, in any manner, a criminal prosecu-

tion, the privileges reserved — for his protection — for one accused of a crime need not, nor should not, be extended to witnesses in an investigatory proceeding. (emphasis added)"

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"Effective administration of the criminal law and the maintenance of public order requires effective methods for the discovery, investigation, and deterrence of crime. (emphasis added)"

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"A recent, highly-publicized use of the Texas statutes began on June 5, 1962. On that date the district attorney of Harris County filed with a local justice of the peace a petition for a court of inquiry into the administration of the probate court of Harris County, setting out that he had good cause to believe that offenses had been committed against the laws of the state and praying that various witnesses be summoned and examined. The justice of the peace granted the petition and ordered the hearing set to begin June 14, 1962. The justice ordered various witnesses summoned, including the then probate judge of the county. (and Petitioner)"

• • • •

"On the following day, June 14, 1962, the court of inquiry began. In four days of testimony, seventeen witnesses were called. Only the district attorney was permitted to examine the witnesses. Some of the witnesses objected to testifying, but only one refused to do so. He was held in contempt, jailed and testified fully the next day. Attorneys representing some of the witnesses attempted to examine their clients on the witness stand, or to "cross-examine" some of the other witnesses."

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"Subsequent to the court of inquiry, the probate court judge and eight individuals were indicted for various felony offenses including conversion of estates, perjury, and bribery.

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"In this same vein, the rather free and unadvised use of the words 'right' or 'constitutional rights' in our modern legal parlance is to be deplored. 'Rights' are being asserted where none exist — nor the need for any — except, as it were, on behalf of those charged or about to be charged with the commission of a crime. In the instant matter, declamations were asserted repeatedly that the witnesses at the court of inquiry had a 'right' to the calling of witnesses, the 'right' of cross-examination, and the 'right' of confrontation of witnesses, as well as the 'right' to have these alleged offenses investigated in the 'secrecy of the grand jury.' It can be readily seen that the first three alleged 'rights' traditionally have been reserved for *defendants who are on trial, in a lawful manner being held to answer for an offense charged against him.* The fourth alleged 'right' does not exist. A suspect simply should not be permitted to direct the manner of the investigation against him." (emphasis added)

The Court of Criminal Appeals of Texas in affirming this cause has further held that one, suspected of crime, may be forced under subpoena and the sanctions of contempt therefrom, to produce under subpoena to the executive branch of the State, incriminating business and private records, as indicated by Defendant's exhibits (Defendant's Motion to Quash the Indictment). The subpoenas in fact were used as search warrants and of course did not comply with any of the requirements of the Fourth and Fourteenth Amendments to the Constitution of the United States as enunciated by this Honorable Court in *Aguilar* v. *Texas, supra; Barnes* v. *Texas,* ..... U.S. ....., 13 L ed 2d 818; *Mapp* v. *Ohio,* 367 U.S. 643; *Ker* v. *California,* 374 U.S. 23; and *Giordenello* v. *United States,* 357 U.S. 480. The Court of Criminal Appeals engaged in specious reasoning when it held in its opinion herein, that all that was required to make the aforesaid unconstitutionally obtained evidence

admissible was for the clerk of the trial court to issue subpoenas for its production at the trial.

It is respectfully suggested that this Honorable Court should here and now, grant Certiorari herein and reverse and remand this cause so that the Court of Criminal Appeals of Texas will fully understand that where a question of constitutional dimension is concerned, it must strike down a state statute and may not hide behind the following shield:

> "The writer has perused with care the record made before the Honorable Sam Davis on Appellant's motion to quash the indictment, made a part of the record in this case, and is of the same opinion as he expressed in *McClelland* v. *State, supra,* and here now expresses the thought that the Legislature should provide needed relief by either eliminating the statute which authorizes the Court of Inquiry or providing some procedural safeguards for the conduct of proceedings before the same. But we have not been able to bring ourselves to hold that the conduct before us here is comparable with that denounced in *Silverthorne, supra.*"

Ninety-five years elapsed between 1791, when the Fourth Amendment was adopted and 1886 when this Honorable Court first had occasion to give it significant interpretation in *Boyd* v. *United States, supra,* ". . . the leading case on the subject of search and seizure . . ." *Carroll* v. *United States,* 267 U.S. 132, 147. This dearth of litigation on the subject is largely due to the fact that it was not until 1878 that Congressional Legislation *permitted* a Defendant to testify in his own behalf in criminal cases (20 Stat. 30; Act of March 16, 1878 c. 37). In *Boyd,* a proceeding for the forfeiture of a quantity of glass alleged to have been imported without the payment of tariff duties, the Government moved to compel the witness to produce the invoices covering the purchase of the goods pursuant to an Act of Con-

gress which provided that such documents, if not produced were to be assumed to contain matters alleged by the prosecution. That Honorable Court unanimously sustained the Defendant's contention that the statutory procedure offended the Fifth Amendment by compelling the Defendant to produce self-incriminating evidence. Seven of the Justices went further, however, holding that the Congressional Act also authorized an unreasonable search and seizure contrary to the terms of the Fourth Amendment. It is noted that the search and seizure in *Boyd* was wholly constructive as there was no actual intrusion upon the Defendant's property or physical seizing of papers. Nevertheless, that Court regarded it as an unconstitutional invasion of the Defendant's privacy since it was an attempt by the Government to obtain information to be used solely for the purpose of establishing proof of the commission of the offense. See also *One 1958 Plymouth Sedan* v. *Pennsylvania*, ... U.S. ....., 33 L.W. 4387.

In *Silverthorne Lumber Company* v. *United States, supra,* this Court had before it another case strikingly similar to the instant one. In *Silverthorne,* the defendants were arrested and taken into custody. While they were being detained, Government agents, without a search warrant, went to defendant's business office and confiscated all of the books, papers and documents there. Upon defendant's Motion to Suppress and for return of the papers, the trial court found that they had been unconstitutionally seized, whereupon the Government agents returned the papers to the defendants but only after they had made copies of all of the material documents. A new indictment was then framed, based on the knowledge thus obtained and subpoenas were served upon the defendants specifying in great detail, all documents sought (all of the detailed information was obtained in the illegal search). The defendants were convicted of contempt for failure to respond to the sub-

poenas. This Honorable Court reversed the conviction in an opinion delivered by Justice Holmes:

> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them;"

In discussing the procedure used by the government in *Silverthorne* this Honorable Court stated that to allow such a procedure,

> ". . . reduces the 4th Amendment to a form of words. 232 U.S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed."

This Honorable Court in *Wong Sun and James Wah Toy* v. *United States,* 371 U.S. 471 (1963), reaffirms *Silverthorne, supra.* The Court in *Wong Sun, supra* held that petitioner Toy's declarations immediately subsequent to his unlawful arrest had to be excluded as "fruits" of the unlawful arrest and that exclusion required also the exclusion of the narcotics obtained by the arresting officers from a third party upon the information obtained from Petitioner Toy. The Court held that the test for exclusion is:

> "whether granting establishment of the primary illegality, the evidence to which instant objection is made

> has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

There can be no question therefore that evidence is inadmissible under the exclusionary rule, including the federal standard, not only when obtained as the *yield* of an illegal search, but also if it results from *information derived from* an illegal search. *Woo Lai Chun* v. *United States,* 274 F. 2d 708 (9th Cir. 1960); *United States* v. *Krulewitch,* 167 F. 2d 943 (2d Cir.); *People* v. *Martin,* 382 Ill. 192, 46 N.E. 2d 997 (1942); *Simmons* v. *State,* 277 P. 2d 196 (Okla. 1954).

The sworn testimony of Frank Briscoe, the District Attorney of Harris County, Texas, who represented the State of Texas from the time that the Court of Inquiry was born, through the trial in the instant case, and in the Court of Criminal Appeals of Texas, shows that prior to the birth of the Court of Inquiry, there was little, if any, information regarding the matters upon which the indictments in the "Probate Scandal" were founded and that initially, the State of Texas did acquire a great deal of evidence through the Court of Inquiry and that the Court of Inquiry was used as an investigative procedure to determine whether or not a criminal offense had been committed. (S.F. 69-71)

In *Malloy* v. *Hogan, supra,* the facts were very similar to the instant case. In *Malloy,* the petitioner was arrested and later plead guilty to a misdemeanor gambling charge and was sentenced to a term in jail and a fine, which sentence was suspended after 90 days, the petitioner being placed on probation for two years. Sixteen months after the guilty plea, the petitioner was ordered to testify before a referee conducting an inquiry into alleged gambling and other criminal activities in the State of Connecticut. He refused to

answer all questions and was adjudged in contempt and committed to prison wherein he eventually effected his appeal to this Court which granted certiorari and reversed, holding:

> ". . . that the Fourteenth Amendment guaranteed the petitioner the protection of the Fifth Amendment's priviledge against self-incrimination, in that *under the applicable federal standard,* the Connecticut Supreme Court of Errors erred in holding that the privilege was not properly invoked." 378 U.S. ....., 12 L. Ed. 2d at 656. (emphasis added)
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> "We turn to the petitioner's claim that the State of Connecticut denied him the protection of his federal privilege. It must be considered irrelevant that the petitioner was a witness in a statutory inquiry and not a defendant in a criminal prosecution, for it has long been settled that the privilege protects witnesses in similar federal inquiries. Counselman v. Hitchcock, 142 U.S. 547, 35 L ed 1110, 12 S Ct 195; McCarthy v. Arndstein, 266 US 34, 69 L ed 158, 45 S Ct 16; Hoffman v. United States, 341 US 479, 95 L ed 1118, 71 S Ct 814. We recently elaborated the content of the federal standard in Hoffman:
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> > "'The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . .'" 378 U.S. ....., 12 L ed 2d at 661.

In *Malloy* this Honorable Court further stated:

> "The shift reflects recognition that the American system of criminal prosecution is *accusatorial, not inquisitorial,* and that the Fifth Amendment privilege is its essential mainstay. *Rogers* v. *Richmond,* 365 US 534, 541 5 L ed 2d 760, 766, 81 S Ct 735. Governments, state and federal, are thus constitutionally compelled to

> establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." (emphasis added) 378 U.S. ....., 12 L ed 2d at 659.

This Honorable Court in *Griffin* v. *California,* No. 202, October term, 1964, ... U.S. ....., 33 L.W. 4382, has recently reaffirmed *Malloy* holding:

> "We take that in its literal sense and hold that the Fifth Amendment, in its direct application to the federal government and its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." ..... U.S. ....., 33 L.W. at 4383.

In the very recent decision in *Pointer* v. *Texas, supra,* this Court once more reaffirmed *Malloy,* stating:

> "We hold that petitioner was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment, and that that guarantee, like the right against self-incrimination, is to be enforced against the States under the Fourteenth Amendment *according to the same standards that protect those personal rights against federal encroachment.* (emphasis added.) *Malloy* v. *Hogan, supra,* 378 U.S. ....., 13 L ed 2d at 928."

Petitioner respectfully suggests that certiorari should be granted herein for the reason that the executive branch of the State of Texas has made such widespread use of the Court of Inquiry procedure not only in the Court of Inquiry in the instant case in which eight individuals were indicted but also in other investigations. In prosecutions growing out of the instant Court of Inquiry, in addition to Petitioner's cause, there will shortly be before this Honorable Court petitions for certiorari in two cases in which the

former probate judge of Harris County, Texas, Clem McClelland is the petitioner. In addition to these two individuals, several persons, indicted as a result of the Court of Inquiry, but not yet brought to trial, are intimately involved in this matter. As is reflected by the case of *Ex-Parte N. A. Smith,* 383 S.W. 2d 401 the inquisitorial procedure allowed by Arts. 886 and 887, *supra,* was again used in Harris County, Texas in a completely separate investigation and many indictments were returned as a result of said inquisition.

It is respectfully suggested that the decision by this Honorable Court as to the constitutionality of Arts. 886 and 887, *supra,* as utilized, should now be decided by this Honorable Court to effect the proper administration of criminal justice in the State of Texas.

The Petitioner herein was deprived of counsel and his rights secured pursuant to the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States when he was compelled to testify at the Court of Inquiry without the benefit of counsel even though his counsel was present in the room at said time. The magistrate would not allow any witness to confer with counsel for the reason that the witness had not been charged by formal complaint.

This Honorable Court discussed a similar situation in *Escobedo* v. *Illinois, supra.* In *Escobedo,* counsel was present in the Police Station but not present in the homicide office wherein Escobedo was being interrogated. In the instant case counsel was physically present, but was unable to assist Petitioner or confer with him due to the arbitrary and unusual rules controlling the Court of Inquiry. This Petitioner contends, that this Honorable Court in discussing the Fifth and Sixth Amendments in *Massiah,* and *Escobedo* required more than mere physical presence of counsel to satisfy the aforesaid constitutional requirements.

This Petitioner was placed in a more serious situation than either *Massiah* or *Escobedo*. In *Massiah* the Government agent was unknown and in *Escobedo* he was given the right to make an election as to whether he would sign a confession or refuse to sign said document. Here the Petitioner was compelled to be present in Court; to be sworn; to answer the questions without conferring with counsel or to pay the penalty of going to jail. This was a trial by the news media and the magistrate. The damage to a professional person has already resulted when his peers witness the sheriff locking him in jail for refusal to obey the magistrate's order to testify.

The instant procedure can be most accurately described as being very similar to the Soviet system as described by Justice Goldberg in *Escobedo* v. *Illinois, supra.*

> "The Soviet criminal code does not permit a lawyer to be present during the investigation. The Soviet trial has thus been aptly described as 'an appeal from the pre trial investigation'."

The observation of Justice Black in the case of *In re Groban,* 352 U.S. 330, at 344, is particularly illustrative of the instant procedure.

> "The right to use counsel at the formal trial, is a very hollow thing when, for all practical purposes, the conviction is already assured by pretrial examination."

II. Certiorari should be granted herein because an important question affecting the personal rights of the individual under Art. 3, § 2, Cl. 3 and the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States is involved.

Petitioner herein was denied, in his state trial, the protections guaranteed to all individuals by the Fifth, Sixth

and Fourteenth Amendments to the Constitution of the United States, since the district court of Harris County, Texas, wherein the crime is alleged to have occurred and wherein the indictment was returned, took it upon itself to change the venue of the case to another county under color of authority of Art. 560, V.A.C.C.P. which allows such a transfer where, in the Court's opinion, neither the state nor the defendant can obtain a fair and impartial trial in the county wherein venue originally lies. Petitioner seriously urges unto this Honorable Court, as he did at every opportunity in the state courts of Texas, that a procedure such as utilized in the instant case, is a gross violation of the right to a speedy and public trial by jury in the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States as well as Art. 3, § 2, Cl. 3, thereof.

Justice Clark wrote in *United States* v. *Cores*, 356 U.S. 405, that the purpose of the Constitutional mandate referred to above was to safeguard against a prosecution against a defendant in a remote spot with all of the attendant prejudices against the defendant. Such were the facts in the instant case wherein a transfer was made to Brazos County, Texas, some 100 miles from Harris County, Texas providing a foundation for the State's case without the Defendant's good name being known in Brazos County as it was in Harris County due to his civic and philanthropic endeavors in his own district.

This Honorable Court held in *United States* v. *Johnson*, 323 U.S. 273:

> "Aware of the unfairness and hardship to which trial in an environment alien to the accused exposes him, the Framers wrote into the Constitution that "the

> Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed . . ." Article 3, § 2, Cl. 1. As though to underscore the importance of this safeguard, it was reinforced by the provision of the Bill of Rights requiring trial by an impartial jury of the State and district wherein the crime shall have been committed. Sixth Amendment."

The Texas Constitution, Art. 3, §45, states that the trial court can change the venue in a civil or criminal case in accordance with the law. It cannot be denied that the United States Constitution is indeed law and the mandate presented therein guarantees to an accused the right to be tried in the locale of the alleged crime. While Art. 3, §45, *supra,* further states that the Legislature of Texas may enact laws providing for such changes of venue, as it did with Art. 560, *supra,* it is submitted that the United States Constitution, Amendments Six and Fourteen, are the framework within which these guiding laws must be placed. Thus, provisions for waiving the right to be tried in the vicinage of the alleged crime could be enacted, but to allow the State to utilize a procedure whereby the accused may be whisked away to be tried on unfamiliar ground, over his objection and without hearing, denies to the accused the due process guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

This Honorable Court has, in recent decisions, held various portions of the Sixth Amendment to be included within the rights guaranteed to the individual citizens of the states in state prosecutions, either directly or indirectly. *Gideon* v. *Wainwright, supra; Massiah* v. *United States, supra; Escobedo* v. *Illinois, supra; Pointer* v. *Texas, supra.* Petitioner respectfully suggests that this cause provides an excellent opportunity for this Honorable Court to discuss the application of the venue portion of the Sixth Amend-

ment to the states since, had this been a Federal prosecution, the action of the Harris County district court would be held to be void, invalid and unconstitutional, without question. There now being a Federal Standard governing the conduct of criminal proceedings, this state procedure should be held unconstitutional. *Griffin* v. *California, supra.*

In *Pointer* v. *Texas, supra,* this Court, dealing with the question of confrontation and cross-examination as applicable to the states by virtue of the Sixth and Fourteenth Amendments, stated:

> "We are aware that some cases, particularly *West* v. *Louisiana,* 194 US 258, 264, 48 L ed 965, 970, 24 S Ct 650, have stated that the Sixth Amendment's right of confrontation does not apply to trials in state courts, on the ground that the entire Sixth Amendment does not so apply. See also *Stein* v. *New York,* 346 US 156, 195-196, 97 L ed 1522, 1548, 73 S Ct 1077. But of course since *Gideon* v. *Wainwright, supra,* it no longer can broadly be said that the Sixth Amendment does not apply to state courts. And as this Court said in *Malloy* v. *Hogan, supra,* 'This Court has not hesitated to reexamine past decisions according to the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme.' 378 US, at 5, 12 L ed 2d at 657. In the light of *Gideon, Malloy,* and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the States by virtue of the Fourteenth Amendment, the statements made in West and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law. ..... U.S. ....., 13 L ed 2d at 927, 928."

This Court further stated in *Pointer* that at least as to the guarantees of confrontation and self incrimination the

Sixth Amendment is to be applied and enforced against the states through the Fourteenth Amendment using the same standards which apply in federal cases, citing *Malloy*. With the opinion in *Pointer*, as it must be construed with *Ker, Aguilar, Gideon, Escobedo* and *Malloy*, this Honorable Court should grant Certiorari herein to discuss the application of the venue portion of the Sixth Amendment to the states through the Fourteenth Amendment, since without question, it is a fundamental right (Art. 3, §2, Cl. 3) and the federal standard requires a reversal herein for the error of the Harris County District Court in arbitrarily changing venue as has been stated above.

CONCLUSION

It is respectfully submitted that this Honorable Court should grant Petitioner's Petition for Writ of Certiorari and reverse and remand said cause to the Court of Criminal Appeals of Texas for action consistent with the opinions of this Court so that there will not be a curtailment of Petitioner's Constitutional guarantees under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,

.....
Clyde W. Woody

.....
Marian S. Rosen

Attorneys for Petitioner

1114 Texas Avenue Building
Houston, Texas 77002
CA 2-9225

CERTIFICATE OF SERVICE

I, Clyde W. Woody, attorney for Petitioner herein, hereby certify that on the ..... day of May, A.D. 1965, I served a copy of the foregoing Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas upon the Honorable Waggoner Carr, Attorney General of Texas, at the Capitol Building, Austin, Texas, by depositing an envelope containing such copy in the United States Mail with first class postage affixed thereto, return receipt requested and addressed to his aforesaid address.

.....

Clyde W. Woody

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Art. 3, § 2, cl. 3
Section 2. Criminal Trial by Jury.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

AMENDMENT [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT [XIV.]

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF TEXAS

Art. 1, § 10. Rights of accused in criminal prosecutions

SEC. 10. In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the

State shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the Legislature may hereafter provide; and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger. Added Nov. 5, 1918.

Art. 3, § 45. Change of venue in civil and criminal cases

SEC. 45. The power to change the venue in civil and criminal cases shall be vested in the courts, to be exercised in such manner as shall be provided by law; and the Legislature shall pass laws for that purpose.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 3. The Complaint

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States.

Rule 4. Warrant or Summons upon Complaint

(a) Issuance. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Form.

(1) Warrant. The warrant shall be signed by the commissioner and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available commissioner.

(2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a commissioner at a stated time and place.

(c) Execution or Service; and Return

(1) By Whom. The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action.

(2) Territorial Limits. The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing

therein or by mailing it to the defendant's last known address.

(4) Return. The officer executing a warrant shall make return thereof to the commissioner or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to the commissioner by whom it was issued and shall be cancelled by him. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the commissioner before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the commissioner to the marshal or other authorized person for execution or service.

VERNON'S ANNOTATED CODE OF CRIMINAL PROCEDURE OF TEXAS

Art. 560. [626] [613] On court's own motion

Whenever in any case of felony the judge presiding shall be satisfied that a trial, alike fair and impartial to the accused and to the State, can not, from any cause, be had in the county in which the case is pending, he may, upon his own motion, order a change of venue to any county in his own, or in an adjoining district, stating in his order the grounds for such change of venue. Acts 1876, p. 274; Const. art. 5, sec. 45.[1]

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[1] Reference to Constitution, art. 5, § 45, should probably have been to Constitution art. 3, § 45.

Art. 886. 976, 941 Court of inquiry

When a justice of the peace has good cause to believe that an offense has been, or is about to be, committed against the laws of this State, he may summon and examine any witness in relation thereto. If it appears from the statement of any witness that an offense has been committed, the justice shall reduce said statements to writing and cause the same to be sworn to by each witness making the same; and, issue a warrant for the arrest of the offender, the same as if complaint had been made and filed.

Art. 887. 977, 942. Witnesses refusing to testify

Witnesses summoned under the preceding article who shall refuse to appear and make a statement of facts, under oath, shall be guilty of a contempt of court, and may be fined not exceeding one hundred dollars, and may be attached and imprisoned until they make such statement.

APPENDIX B

No. 37,037

JAMES BRYSON MARTIN,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

APPEAL FROM BRAZOS COUNTY

OPINION

The conviction is for bribery; the punishment, four years in the penitentiary and a fine of $2,500.

Appellant, James Bryson Martin, and Ross Evahn, David Hudson, E. R. Coffey, and R. M. Duren were jointly charged by indictment with the offense of bribery of one Clem McClelland, a probate judge of Harris County.

Motions for severance were filed in Criminal District Court No. 5 of Harris County, in which court the indictment was pending, by appellant and also by his four codefendants. The codefendants' motion was by the court granted and, the defendants being unable to agree upon the order of trial, appellant was ordered to be tried first.

After granting the severance, the court on his own motion ordered venue of the cause changed to Brazos County and trial in the 85th Judicial District Court of said county. In the order changing venue, the court found that a trial alike fair and impartial to the accused and the state could not be had in Harris County because of the existence in the county of such great prejudice against appellant.

This is an appeal from appellant's trial and conviction in Brazos County.

The indictment, omitting the formal parts, charged:

> ". . . that on or about the 2nd day of December, A.D. 1960, in said County and State, Clem McClelland was then and there the Judge of the Probate Court of Harris County, Texas, a judicial officer, the said Clem McClelland having been duly elected and qualified as such officer and having entered upon the duties of said office, a part of said duties being the appointment of appraisers, administrators and guardians in matters, causes, and proceedings filed in the Probate Court; and ROSS EVAHN, DAVID HUDSON, E. R. COFFEY, R. M. DUREN, and JAMES BRYSON MARTIN did then and there unlawfully, wilfully, and corruptly bribe and offer to bribe the said Clem McClelland by giving him the sum of Twenty-Five Thousand Seven Hundred Eighty-Three Dollars and Ten Cents ($25,783.10) in money with the intent to influence the acts, decisions, judgments and recommendations of the said Clem McClelland in his judicial capacity to thereafter appoint them, the said ROSS EVAHN, DAVID HUDSON, E. R. COFFEY, R. M. DUREN, and JAMES BRYSON MARTIN as appraisers, administrators, and guardians in matters, causes, and proceedings then pending before the said Clem McClelland in his judicial capacity, and in matters, causes, and proceedings which would thereafter be brought before and come before the said Clem McClelland in his judicial capacity in violation of his duty as said officer."

The state's evidence shows that on the dates in question, Clem McClelland was the duly elected and acting probate judge of Harris County.

As probate judge, it was Judge McClelland's duty to appoint administrators, guardians, and appraisers in cases filed in his court. During the period from January 1, 1961, through May, 1962, Judge McClelland appointed the appellant and his codefendants, Ross Evahn, David Hudson, E. R. Coffey, and R. M. Duren, as appraisers in estates for a total of 3511 times. In this same period he appointed 257

other persons as appraisers in estates for a total of 2225 times. It was shown that until January 1, 1962, the appraisers in each estate received a fee of $5, which was charged as court costs, but that additional appraisal fees were paid the appellant and his codefendants in certain estates. In one estate, appellant and two of his coindictees received the sum of $1,200; in another estate appellant, together with one of his coindictees and another person, received $300; and in a third estate appellant received a fee of $50.

On December 2, 1960, the appellant and two other persons obtained articles of incorporation from the secretary of state, authorizing the corporation to do business under the name of Tierra Grande, Inc. The appellant, acting as president of the corporation, on December 2, 1960, opened a bank account in the name of Tierra Grande, Inc., in the Citizens State Bank of Houston. The only two persons authorized to make withdrawals from the account were the appellant and Helen Smith, who had been Judge McClelland's secretary for a number of years. Beginning in December, 1960, and in each succeeding month through May, 1962, the appellant and his four coindictees made numerous deposits into the Tierra Grande, Inc. account. During such period, Evahn's deposits totaled $6,775; Hudson's totaled $4,750; Coffey's totaled $3,666.10; Duren's totaled $7,975; and those of the appellant were in the total sum of $558. During this same period of time numerous checks were drawn on the Tierra Grande account which were either payable to Judge McClelland or, from the notations thereon, were shown to be for his benefit. The total amount of checks payable to Judge McClelland or to cash and endorsed by him was in the sum of $10,550. Many other checks in various amounts were shown to have been issued for the judge's benefit. Some of the checks drawn on the Tierra Grande, Inc.

account and payable to Judge McClelland had been endorsed by him and deposited to his personal account in another bank.

Appellant did not testify or call any witnesses in his behalf.

In submitting the issue of appellant's guilt to the jury, the court charged upon the law of principals and circumstantial evidence.

We find the evidence sufficient to support the judgment of conviction.

The record is before us without any formal bills of exception.

Complaint is made to the court's refusal to quash the indictment. Appellant timely filed and presented to the court a motion to quash the indictment, in which he alleged numerous reasons why the indictment failed to charge an offense. In the motion, appellant further excepted to the indictment on the ground that it was returned by a grand jury which had before it evidence that had been illegally obtained in a court of inquiry held before Justice of the Peace W. C. Ragan, of Precinct No. One of Harris County, in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

The record contains the motion to quash the indictment, together with the court's order thereon and a statement of facts of the evidence adduced in connection therewith. The court's order does not show an exception by appellant to the court's ruling, as required by Art. 760e, V.V.C.C.P., to constitute an informal bill of exception under such article. Brooks v. State, 342 S.W. 2d 439.

We have, however, examined the indictment in the light of appellant's exceptions and find that it follows the statute,

and the allegations are sufficient to charge the offense of bribery, under Art. 158, V.A.P.C.

Appellant's attack upon the indictment on the ground that it was returned upon evidence illegally obtained in a court of inquiry is similar to that urged and overruled in McClelland v. State, 373 S.W. 2d 674, where it was held that such was not a ground for quashing an indictment in this state.

Complaint is made to the court's action in denying appellant's motion for severance and in granting his codefendants' motion and ordering him tried first. In his motion, appellant alleged that Judge Clem McClelland was under indictment for an offense growing out of the same transaction, and requested that he be tried first. Request was further made that following Judge McClelland's trial, appellant's coindictees, Evahn, Hudson, Coffey, and Duren, be put to trial in the order named.

We find no error in the court's action. The record shows that the court, in fact, granted a severance on motion of appellant's coindictees, Evahn, Hudson, Coffey, and Duren. It further appears that appellant and his four coindictees were unable to agree upon the order of trial. Upon their failure to agree, it was the duty of the court, under Art. 652, V.A.C.C.P., to direct the order of trial. In ordering appellant tried first, the court did not err. Henderson v. State, 192 S.W. 2d 446.

Complaint is also made to the court's action in ordering venue changed to Brazos County. Appellant does not present by either formal or informal bill of exception any facts which refute the court's finding that a fair and impartial trial to both appellant and the state could not be had in Harris County. In the absence of such proof it will be presumed, on appeal, that the court had a basis

for such finding, and no error is shown. Ross v. State, 220 S.W. 2d 137.

Complaint is made to the court's action in permitting the state's witness, Deputy County Clerk Weldon H. Kretschmar to testify from a list which had been prepared by him and others under his direction, showing all the appraisers appointed by Judge McClelland during the period from December 1, 1960, through May, 1962. Complaint is also made to the court's action in admitting the list in evidence, as state's exhibit #43, over appellant's objection that it was in violation of the best-evidence rule.

The witness Kretschmar, as deputy county clerk of Harris County, was shown to be custodian of the probate records. He testified that the list was prepared from the records by him and those under his direction, and verified the accuracy of the list and stated that it was prepared from the original records, which consisted of between sixteen and seventeen thousand pages and contained between five and six thousand guardianships.

The original probate records were in court at the trial and made available to appellant for inspection. Under the record, the court did not err in admitting the list in evidence and in permitting the witness to testify from the list, which was a summation made by the witness from the original records of the appointments made by Judge McClelland during the period of time shown. New Amsterdam Casualty Company v. W. D. Felder & Co., 214 Fed. 2d 825, 5 Cir.; Spradlin v. Rosebud Feed & Grain Co., 294 S.W. 2d 301, Civ. App., writ refused.

We overrule appellant's contention that the court erred in allowing the state to introduce evidence which was unconstitutionally obtained, in violation of his rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to

the Constitution of the United States. An examination of the record does not reflect that any illegally obtained evidence was introduced against appellant. The evidence presented against him consisted of the testimony of witnesses and numerous exhibits of bank records which were presented in court under subpoenas issued by the district clerk of Brazos County. No evidence which appellant insists was illegally obtained in the court of inquiry was introduced upon the trial.

We also overrule appellant's contention that the penalty provision of Art. 158, *supra,* is so vague and indefinite as to render the statute void.

The penalty provision of the statute provides:

> ". . . shall be confined in the penitentiary not less than two nor more than five years, or be confined in jail for not less than one month nor more than two years, or be fined not less than Five Hundred Dollars nor more than Five Thousand Dollars, or by both such fine and imprisonment."

In Mosier v. State, 234 S.W. 225, a similar penalty provision in Art. 1150, V.A.P.C., defining the offense of failure to stop and render aid, was upheld against a contention that it was vague and indefinite.

The judgment is affirmed.

DICE, Judge

(Delivered January 6, 1965)
Opinion approved by the court.

No. 37,037

JAMES BRYSON MARTIN,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

APPEAL FROM BRAZOS COUNTY

OPINION

ON APPELLANT'S MOTION FOR REHEARING

In a scholarly manner appellant has attacked our original opinion because we failed to discuss his contention that all evidence as to the Tierra Grande books were introduced over his objection that they were tainted under the "fruits of the poisonous tree" doctrine so ably announced years ago by the Supreme Court of the United States in Silverthorne Lumber Company v. United States, 251 U.S. 385, 64 L. ed. 319, 40 S. Ct. 182. His contention is bottomed upon the assertion that the subpoena duces tecum issued by the Court of Inquiry which made it possible for the prosecution to secure possession of copies of such records was an illegal process because the Court of Inquiry itself was conducted in an unconstitutional manner.

The answer to this contention seems to be that both our Civil Courts and this Court have had this question before them and have failed to agree with him.

While it is true that this writer on Motion for Rehearing in McClelland v. State, 373 S.W. 2d 674, expressed his trepidation over the propriety of the manner in which the Court of Inquiry was conducted, and Chief Justice Bell and Justice Coleman expressed their concern over the same matter in McClelland v. Briscoe, 359 S.W. 2d 635, no court has held that such procedure reaches constitutional dimensions.

Silverthorne, *supra,* was a case of search without a warrant and by virtue of an invalid subpoena. Here we have a subpoena duces tecum (itself a process authorized by statute) issued by the Justice of the Peace who was acting pursuant to his authority after having convened the Court of Inquiry which was authorized by Article 886, V.A.C.C.P., a statute of this State which was first enacted by the Legislature in 1876.

It is not within the province of an appellate court to declare unconstitutional all that appears to them to be unfair and not wise exercise of the powers of government. In the case of Sproles v. Binford, 286 U.S. 374, 76 L. ed. 1167, 52 S. Ct. 581, the Supreme Court of the United States said:

> "When the subject lies within the police power of the State, debatable questions as to the reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome."

The writer has perused with care the record made before the Honorable Sam Davis on Appellant's motion to quash the indictment, made a part of the record in this case, and is of the same opinion as he expressed in McClelland v. State, *supra,* and here now expresses the thought that the Legislature should provide needed relief by either eliminating the statute which authorizes the Court of Inquiry or providing some procedural safeguards for the conduct of proceedings before the same. But we have not been able to bring ourselves to hold that the conduct before us here is comparable with that denounced in Silverthorne, *supra.*

Appellant's contention as to the failure of the court to place McClelland on trial first is without merit because the court was without the power to direct the order of trial in

in McClelland's case, as he had already transferred the case against McClelland to another county and could not prevent a continuance in appellant's case by then ordering McClelland's case first. Henderson v. State, 283 S.W. 497.

The appellant's motion for rehearing is overruled.

Morrison, Judge

(Delivered February 17, 1965)

APPENDIX C

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS

OF TEXAS

AUSTIN, TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 37,037 styled:

JAMES BRYSON MARTIN,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

judgment of the 85th Judicial District Court of Brazos County, Texas, was affirmed on January 6, 1965, Appellant's Motion for Rehearing overruled, February 17, 1965, and order staying mandate and all other proceedings, to permit appellant to apply to the Supreme Court of the United States for a Writ of Certiorari, was issued and filed February 18, 1965.

THEREFORE, with the overruling of Appellant's Motion for Rehearing, this cause was disposed of by this Court on February 17, 1965, appellant having exhausted all remedies in this, the Court of Criminal Appeals of Texas, and the Court of Last Resort of Texas in criminal cases; and said judgment has now become final on the docket of this Court.

WITNESS my hand and seal of said Court, at office, in Austin, Texas this 8th day of April, A.D. 1965.

/s/ Glenn Haynes
Glenn Haynes,
Clerk, Court of Criminal Appeals
of Texas